FILE COPY

Office - Supreme Court, U. S.
FILED
APR 20 1943
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1942

No. 723

INTERNATIONAL ELEVATING COMPANY,
Appellant,

vs.

FRIEDA S. MILLER, AS INDUSTRIAL COMMISSIONER OF THE STATE OF NEW YORK, AND JOSEPH BERGEN.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT

BRIEF FOR APPELLANT

ARTHUR E. GODDARD,
Counsel for Appellant,
177 Montague Street,
Brooklyn, N. Y.

JULES HABERMAN,
ROBERT B. LISLE,
Of Counsel.

INDEX

	PAGE
OPINIONS BELOW	1
JURISDICTION	1
STATEMENT OF THE CASE	2
Facts	2
Statutory Background	3
General Background	5
The Decisions Below	6
SPECIFICATION OF ERRORS TO BE URGED	7
SUMMARY OF ARGUMENT	8
POINT I. The Power of the United States within the maritime field is exclusive	9
Workmen's Compensation Cases	9
1. The Jensen doctrine should be applied here for the same reason assigned for its application to workmen's compensation: uniformity	11
2. Allowance of a claim for benefits cannot be sustained as the imposition of an excise tax	13
3. There is no adequate distinction between unemployment insurance and workmen's compensation	14
POINT II. Whether or not Congress has the power to do so, it has not delegated the jurisdiction asserted in this case	16
1. There is no express delegation nor may delegation be implied	16

PAGE

2. The decision of the court below will complicate seriously the administration of a federal system of unemployment insurance for the maritime industry if proposed federal legislation is adopted 17

CONCLUSION 18

TABLE OF AUTHORITIES

CASES

Atlantic Transport Co. v. *Imbrovek*, 234 U. S. 52 (1914) 4

Clarke v. *Ackerman*, 243 App. Div. 446 (1935) 11

Davis v. *Department of Labor*, 317 U. S. 249 (1942) 10

Helvering v. *Griffiths*, No. 467, October Term, 1942, decided March 1, 1943 10

International Stevedoring Co. v. *Haverty*, 272 U. S. 50 (1926) 4

Just v. *Chambers*, 312 U. S. 383 (1941) 15

Knickerbocker Ice Co. v. *Stewart*, 253 U. S. 149 (1920) 10, 11, 13, 16

Matter of Bergen, 262 App. Div. 654 (1941) 1
Matter of Cassaretakis, 289 N. Y. 119 (1942) 1
Mountain Timber Co. v. *Washington*, 243 U. S. 219 (1917) 14

PAGE

Southern Pacific Co. v. *Jensen*, 244 U. S. 205 (1917).. 5, 9, 10, 13, 18

Washington v. *Dawson & Co.*, 264 U. S. 219 (1924).. 10, 13, 14, 15, 16

STATUTES

Act of June 10, 1922, c. 216, 42 Stat. 634 (see 28 U. S. C. §§ 41, 371) 10

Act of Oct. 6, 1917, 40 Stat. 395 (see 28 U. S. C. § 371) 9

Constitution of the United States, Article III, Section 2 ..... 4, 7, 8

Internal Revenue Code, Section 1607 (c) (4), formerly Section 907 (c) (3) of Title IX, Social Security Act 3, 5, 6, 7

Judicial Code of 1789, Section 9, 1 Stat. 76, 77 (see, 28 U. S. C. § 371) 9

Judicial Code, Section 237 (a), 28 U. S. C. § 344 1

Longshoremen's and Harbor Workers' Act, 44 Stat. 1426, 33 U. S. C. § 903 (a) (1) 4

New York Labor Law, Article 18 (Chapter 31 of the Consolidated Laws) 7
Section 530.2* 7
Section 502.1 7

New York Session Laws
L. 1936 c. 117 12
L. 1939 c. 662 12
L. 1941 c. 169** 12

---

* Printed in Appendix, pp. 19-21.
** See Appendix, p. 21.

PAGE

Revised Statutes of New Jersey
New Jersey Unemployment Compensation Law 11, 12
Title 43, Chapter 21, Section 19 12

Social Security Act, Title VIII, Section 811 (b) (5), 49 Stat. 639, amended Aug. 10, 1939 3

OTHER AUTHORITIES

Commerce Clearing House, Unemployment Insurance Service, ¶¶ 993A, 1368, 1380-1384 ..... 5, 13

H. R. 560, introduced January 3, 1941, 77th Congress, First Session 17

H. R. 5446, introduced July 30, 1941, 77th Congress, First Session 17

House Report No. 1767, 69th Congress, Second Session, p. 20..... 16

Report of Attorney General (N. Y.—1936)*..... 5

Report of Social Security Board, Document No. 110, p. 16, 76th Congress, First Session, House of Representatives 4

Report of National Resources Planning Board (N. Y. Herald Tribune, Thursday, March 11, 1943)..... 4

Senate Report No. 973, 69th Congress, First Session, p. 16 16

---

* Printed in Appendix, pp. 23-27.

Supreme Court of the United States,

OCTOBER TERM, 1942

INTERNATIONAL ELEVATING COMPANY, *Appellant,* *vs.* FRIEDA S. MILLER, AS INDUSTRIAL COMMISSIONER OF THE STATE OF NEW YORK, AND JOSEPH BERGEN.	No. 723

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT.

BRIEF FOR APPELLANT

Opinions Below

The opinion of the New York Court of Appeals is reported in 289 N. Y. 119, sub nom. *Matter of Cassaretakis;* that of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department is reported in 262 App. Div. 654.

Jurisdiction

This appeal was allowed by order (R. 70) of the Chief Judge of the New York Court of Appeals upon application by the appellant (R. 71). Jurisdiction of this Court is sustained by Section 237(a) of the Judicial Code (28 U. S. C. § 344(a)). This Court noted probable jurisdiction, March 8, 1943 (R. 77).

Statement of the Case

This is an appeal from a determination by the Court of Appeals of the State of New York that the unemployment insurance law of New York may constitutionally be applied to employment which is exclusively maritime in character. The Court of Appeals reversed the contrary determination by the Appellate Division of the Supreme Court, Third Judicial Department which in turn had reversed a decision by the New York Unemployment Insurance Appeal Board holding that claimant herein was entitled to benefits under the unemployment insurance law of New York.

Determinations of fact and law in a proceeding for benefits bind an employer, such as appellant, as to its liability for contributions with respect to the employment of the particular claimant and also with respect to all similar employment. N. Y. Labor Law, Section 530.* Though the claimant's right to benefits does not depend on the fact of contribution, the granting of benefits may imply a legal liability on the part of the employer to make contributions.

Facts

Claimant worked for the appellant during 1938 and 1939 as a grain trimmer in connection with its operation of self-propelled floating grain elevators on the navigable waters of the United States engaged in the loading and unloading of grain to and from ocean-going vessels in the harbor of New York (R. 3-4, 23, 33). The particular elevator proceeds to a pier to which a steamship is moored, comes alongside and makes fast; whereupon the vessel, to or from which the transfer is to be made, is brought alongside and made fast to the elevator (R. 19). The leg of the elevator is then dropped into the grain vessel and the grain is elevated from the vessel into the elevator by means of a conveyor belt with buckets attached (R. 16, 17). The grain then passes through a pipe into the hold of the receiving vessel (R. 32). Grain trimmers may work in the

---

* Printed in Appendix, page 22.

hold of the discharging or receiving vessel or on the elevator itself (R. 18).

The duty of the trimmers in the discharging vessel is to operate the steam shovels, powered from the elevator, which push the grain to the elevator leg (R. 16, 17, 18, 26). Other trimmers see to the proper trimming of the grain cargo in the hold of the receiving vessel. Trimmers may also handle lines whereby the elevator and the grain vessel or barge are brought alongside and made fast (R. 32, 36); they habitually go out with the same elevator (R. 20, 34).

Claimant never worked ashore (R. 24, 35). The Appeal Board found "that the grain elevator on which the claimant performed his services was a vessel * * * and that the waters on which said services were performed were navigable waters of the United States" (R. 6).

Some of the piers at which the employer's elevators are used are located in New York. Others are in New Jersey. Claimant performed services adjacent to both states during the period involved in this cause (R. 33, 50).

Statutory Background

Title IX of the Federal Social Security Act (now the Unemployment Taxing Act), the taxing provisions of which became effective January 1, 1936, was enacted August 14, 1935 as an inducement to the states to provide state systems of unemployment insurance.

Section 907 (c) (3) of Title IX (now Section 1607 (c) (4) of the Internal Revenue Code) excluded from employment covered by the act services performed by an officer or a member of the crew of a vessel on the navigable waters of the United States.* There is reason to suppose that this

---

* A comparable exclusion was made in Title VIII of the Social Security Act as it was originally enacted (Sec. 811 (b) (5)). On amendment of the Act in August, 1939 the maritime exclusion was dropped in connection with the federally administered old age benefit system (Title VIII) but continued in connection with the state administered unemployment insurance systems.

exclusion was occasioned in part by the anticipated administrative difficulties in connection with the application of unemployment insurance legislation in the maritime field and, in part, by considerations as to the limited extent of state jurisdiction under the admiralty clause of the Constitution of the United States, Article III, Section 2. In a report of the Social Security Board, Document No. 110, Page 16, 76th Congress, First Session, House of Representatives, appears the following:

> "Under the Constitution it is impossible to confer upon the States jurisdiction over maritime employment, with the possible exception of that incidental to employment on land. Therefore, in order to afford unemployment compensation protection to seamen it would be necessary to pass a Federal Act."

On March 10 last the National Resources Planning Board published a report which recommended extension of unemployment compensation as follows:

> "(a) Coverage should be extended to embrace seamen* and employees of non-profit corporations and firms employing one worker or more." New York Herald Tribune Thursday March 11, 1943.

It is evident, however, that whatever its intention may have been, Congress did not enact an exclusion coextensive with the assumed jurisdictional barrier. Officers and members of the crew are only a section of a larger category of maritime employees as Congress recognized in the Federal Longshoremen's and Harbor Workers' Act, applicable, by its terms, to maritime workers other than "a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net." (33 U. S. C. Section 903 (a) (1).)

---

* The scope of the term, "seamen" has been defined by the decisions of this Court. (See *International Stevedoring Co.* v. *Haverty*, 272 U. S. 50 (1926); and *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52 (1914).)

All of the forty-eight states, together with the territories of Alaska and Hawaii and the District of Columbia, reacted to the inducement of Title IX of the Federal Social Security Act, and by July 1, 1937, had enacted unemployment insurance laws. In forty-six of these original enactments services as an officer or member of the crew were excluded from covered employment. Louisiana, however, added to the Federal exclusion the words "customarily operating between ports in this State and ports outside this State". California excluded:

> "Maritime services as to which this State is prohibited by the Constitution and laws of the United States of America from requiring contributions of employers or their workers with respect to wages as provided in this act".

This exclusion was artfully tailored to fit the exact extent of the jurisdictional limitation under the Constitution. It has been taken over by Arkansas, Minnesota and Oklahoma.

New York State and a few others failed to make any maritime exemption. (See, Commerce Clearing House, Unemployment Insurance Service, ¶¶933A, 1368.)

General Background

In January 1936 there appeared a published opinion* of the Attorney General of the State of New York (Report of Attorney General (1936), Page 268) holding that the doctrine of *Southern Pacific Company* v. *Jensen*, 244 U. S. 205 (1917) applied to unemployment insurance. Maritime employers generally felt safe in assuming that maritime services, except when performed in connection with services ashore, were not within the scope of the unemployment insurance law of the State of New York.

In April 1936 the employer in this cause received a letter from the New York State Division of Placement and Unemployment Insurance which, in conjunction with the

---

* Printed in Appendix, pages 23-27.

Attorney General's published opinion, was taken to exempt their elevator employees, no part of whose services is performed ashore (R. 42, 43).

In January 1937 this employer, after several exchanges of letters between it and the Treasury Department, received a communication from the latter to the effect that its elevator employees were not covered by Title IX of the Federal Social Security Act (Employer's Exhibit No. 1, R. 40, 50, 51).

In May of 1937 the union with which claimant was affiliated was likewise informed by the Treasury Department that grain trimmers (such as claimant) were regarded by that department as "officers and members of the crew, etc."* (Employer's Exhibit No. 2, R. 41, 51, 52).

Four and one-half years after the appearance of the Attorney General's published opinion, the present proceeding was begun in the course of which the Industrial Commissioner of the State of New York betrayed for the first time to this employer, non-concurrence with the opinion of the Attorney General.

The Decisions Below

The New York Unemployment Insurance Appeal Board upheld the referee of the industrial commissioner, determining that claimant was not an officer or member of a crew of a vessel on the navigable waters of the United States and accordingly that the unemployment insurance law was applicable to his employment.

The Appellate Division, unanimously reversing the decision of the Unemployment Insurance Appeal Board, held

---

* In March of 1942 the employer was advised by the Treasury Department that the matter of the status of grain trimmers such as claimant had been reconsidered and that the early rulings that grain trimmers were officers and members of the crew within the exclusion were thereby revoked. This revocation was not given retroactive effect, however.

that the unemployment insurance law could not be constitutionally applied to employment exclusively maritime in character as claimant's employment was conceded to be by the Appeal Board. The Appellate Division referred to the fact that claimant was a member of the crew of a vessel on the navigable waters of the United States as an additional ground for reversal.

The Court of Appeals, unanimously reversing the Appellate Division, held that the unemployment insurance law was applicable to maritime employment whether or not the employment was that of an officer or member of the crew of a vessel on the navigable waters of the United States. The Court of Appeals also sustained the Appeal Board's determination, with respect to claimant, that his services were not performed as an officer or member of the crew of a vessel on the navigable waters of the United States, thus rejecting the additional ground for reversal referred to by the Appellate Division.

Specification of Errors to Be Urged

The appellant has assigned and now urges the following error:

The Court of Appeals erred in holding that the unemployment insurance law, New York Labor Law, Article 18 (Consolidated Laws, Chapter 31), when applied to workers, such as claimant, engaged solely in maritime employment, is valid and does not violate the provisions of Article III, Section 2 of the Constitution of the United States.*

---

* The appellant has also assigned errors as follows:

2. The Court of Appeals erred in holding that said law, when applied to workers, such as claimant, engaged solely in maritime employment, constituting services as an officer or member of the crew of a vessel upon the navigable waters of the United States under applicable rulings of federal administrative authorities, and therefore outside the scope of the Federal Unemployment Tax Act, Section 1607 (c)

(Footnote continued on next page)

Summary of Argument

1. The power of the United States within the maritime field is exclusive.

Appellant relies on decisions by this Court dealing with the jurisdiction of states to apply their workmen's compensation laws in the maritime field. It shall be argued,

> First, that the constitutional doctrine established in the workmen's compensation cases should be applied in the field of unemployment insurance for the same essential reason assigned for its application

---

(4), is valid and does not violate the provisions of Article III, Section 2 of the Constitution of the United States.

3. The Court of Appeals erred in refusing to review the determination of the Referee and the Unemployment Insurance Appeal Board that this claimant was not an officer or member of the crew of a vessel upon the navigable waters of the United States, notwithstanding a determination to the contrary by the federal administrative authorities.

4. The Court of Appeals erred in holding that section 534 of said law, providing that determinations of fact by the said Appeal Board shall be final, when applied to a determination of such a *jurisdictional* fact as whether or not claimant was performing service as an officer or member of the crew of a vessel on the navigable waters of the United States, is valid and does not violate Article III, Section 2 of the Constitution of the United States.

5. The Court of Appeals erred in failing to hold, as a matter of law, that claimant was a member of the crew of a vessel on the navigable waters of the United States.

Under the view we now take the errors assigned designated "2" through "5" need not be urged. Although implicit in the language of the opinion below, they were not necessary to the result since the court held that the state has the power asserted regardless of whether or not the employment comes within the federal exemption. Analysis of the decision indicates that although the court might have committed these errors it did not in fact do so. Our argument will therefore be confined to the error actually committed.

to workmen's compensation, the practical utility of the application of this doctrine to the maritime employment being apparent in this very case;

Second, that the application of the unemployment insurance law to sustain the claim herein may not be upheld as an imposition of an excise tax on employment;

Third, that there is no adequate distinction between unemployment insurance and workmen's compensation to justify the departure in the case at bar from the constitutional doctrine established in the workmen's compensation cases.

II. Whatever the power of Congress may be to delegate the jurisdiction asserted by the appellee, the fact of delegation is not present in this case.

POINT I

The power of the United States within the maritime field is exclusive.

Workmen's Compensation Cases

In the beginnings of workmen's compensation, this Court held that states could not administer their workmen's compensation laws in the maritime field even though the Judicial Code saved to suitors in all cases "the right of a common law remedy, where the common law is competent to give it" (Section 9, Judicial Code of 1789, 1 Stat. 76, 77; see, 28 U. S. C. §371).

Southern Pacific Co. v. *Jensen,* 244 U. S. 205 (1917).

Congress thereafter amended the Judicial Code to save "to claimants the rights and remedies under the workmen's compensation law of any State" (Act of October 6, 1917, 40 Stat. 395; see, 28 U. S. C. §371).

This amendment, however, proved abortive.

Knickerbocker Ice Co. v. *Stewart*, 253 U. S. 149 (1920).

Again, in 1922, Congress further amended the Judicial Code to save to claimants "other than the master and members of the crew of a vessel their rights and remedies under the workmen's compensation law of any State" (Act of June 10, 1922, c. 216, 42 Stat. 634; see, 28 U. S. C. §§41, 371). This amendment likewise proved abortive.

Washington v. *Dawson & Co.*, 264 U. S. 219 (1924).

The doctrine established by the *Jensen* case and extended in *Knickerbocker Ice Co.* v. *Stewart* and *Washington* v. *Dawson & Co.* has become such an integral part of the law that its repudiation at present would create more difficulties than it would resolve.

See,

Davis v. *Department of Labor*, 317 U. S. 249 (1942).

Mr. Justice Frankfurter pointed out in the latter decision (at p. 259) that:

> "Federal and state enactments have so accommodated themselves to the complexity and confusion introduced by the *Jensen* rulings that the resources of adjudication can no longer bring relief from the difficulties which the judicial process itself brought into being."

Accommodation to the *Jensen* ruling by legislatures and administrative authorities is a *fact* to be reckoned with in this cause. Adherence to the *Jensen* ruling is thus required "to avoid unfortunate practical results from a change".

See,

Helvering v. *Griffiths*, No. 467, October Term, 1942, decided March 1, 1943.

1.

The Jensen doctrine should be applied to unemployment insurance for the same reason assigned for its application to workmen's compensation.

Whatever difficulties may have resulted from the ruling in the *Jensen* case, it had as its object the relief of maritime commerce from "unnecessary burdens and disadvantages incident to discordant legislation" and the establishment of "harmonious and uniform rules applicable throughout every part of the Union". *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, 164. This justification for the *Jensen* doctrine is present in the instant case. Appellant confronts real difficulties and substantial embarrassments in view of the fact that its employees, including claimant, performed substantial services within the territorial jurisdiction of both New York and New Jersey.*

The decision of the Court of Appeals below held that *all* of claimant's employment constituted New York employment notwithstanding the possibility that New Jersey may claim that the services performed within its territorial jurisdiction constitute New Jersey employment. This possibility** will be substantiated by a comparison of the New York and New Jersey statutes as they existed during the period from January 1, 1938 to June 3, 1939:

New York	*New Jersey*
"As used in this article:	"The term 'employment' shall include an individual's entire service performed within or both within and without this State if:
1. 'Employment' except where the context shows otherwise, means any employment under any contract of hire, express or implied, written or oral, including all	(A) The service is *localized* in this State; or

* As to territorial jurisdiction of New York and New Jersey see *Clarke* v. *Ackerman*, 243 App. Div. 446-448.

** The possibility which we note above has become an actuality. The appellant now stands liable for contributions to both New York and New Jersey with respect to the same employment.

contracts entered into by helpers, and assistants of employees, whether paid by employer or employee, if employed with the knowledge actual or constructive of the employer, *in which all or the greater part of the work* is to be performed within this state." (Laws of 1936, chapter 117; compare Laws of 1939, chapter 662; Laws of 1941, chapter 169.) (italics supplied)

(B) The service is not localized in any state but some of the service is performed in this state and (i) *the base of operations*, or, if there is no base of operation, then the place from which such service is directed or controlled, is in this State; * * *" (43:21-19 (i) (2)). (italics supplied)

Under these statutes claimant's employment might come within the jurisdiction of the State of New York as employment "in which all or the greater part of the work is to be performed within this State" (New York Labor Law, Sec. 502; Laws of 1936, Chap. 117), as well as within the jurisdiction of the State of New Jersey as employment in which "some of the service is performed in this State and (i) the base of operations * * * is in this State" (New Jersey Unemployment Compensation Law,* 43:21-19).

The existence of this difficulty shows emphatically that there is distinct utility to the constitutional doctrine on

---

* Since June 3, 1939 Section 502 of the New York Labor Law has been amended on various occasions with the result that after June 3, 1939 it has contained in substance the same provisions as are contained in the New Jersey law set forth in the text respecting the allocation of work performed in two or more states. These amendments, though they resolve theoretical conflicts between the statutes themselves, do not solve actual conflicts in connection with their application. It is obvious that any determination as to the localization of the employment or as to the base of operations or place of direction or control will present a close and difficult question of fact, inconsistent answers to which by the respective administrative authorities will be inescapable. Present definitions of employment are printed in the Appendix, pages 19-21.

which the appellant relies and that the application of the *Jensen* doctrine to unemployment insurance will achieve the constitutional object, envisaged by the Court in the *Knickerbocker Ice Co.* case, "to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation."

When the learned Court below declares that "the difficulty conjured up would appear to be more imaginary than real", it is closing its eyes to real and present problems, the existence of which is generally recognized. See C. C. H. Unemployment Insurance Service, ¶¶ 1380-1384. The Court also fails to recognize that the two State statutes in effect during the greater part of the period involved in this case are in utter conflict.

The learned Court below, after minimizing the lack of harmony between the two State statutes, continues: "in no event could (the difficulty) affect the result arrived at herein." We submit that this statement is clear evidence that the learned Court below, in the guise of distinguishing the workmen's compensation cases, has actually repudiated their doctrine. The Court beclares that lack of uniformity and lack of harmony which, under the decisions of this Court, are the sole criteria of the application of the *Jensen* principle, are not material in a case involving the application of a state law in the maritime field.

2.

The allowance of a claim for benefits by a person whose services were exclusively maritime in character cannot be sustained as the imposition of an excise tax on the privilege of employment.

The Court of Appeals below sought to sustain the allowance of the claim here by asserting the validity of the application of a state excise tax in the maritime field. This Court cannot accept any such basis for the result reached by the Court below unless it is prepared to overrule its decision in *Washington* v. *Dawson & Co.*, 264 U. S. 219 (1924).

In the latter case the employer was disputing the right of the State of Washington to require contributions to the state compensation fund payable to the fund in the same manner in which unemployment insurance contributions are payable, based on a percentage of the employer's payroll. That such contributions were in the nature of a tax was recognized by Mr. Justice Brandeis in his dissenting opinion, p. 231; see also, *Mountain Timber Co.* v. *Washington*, 243 U. S. 219, 237 (1917).

The *Dawson* case was concerned only with the contributions aspect of the Washington workmen's compensation law and the right of the State to collect such contributions was denied.

3.

There is no adequate distinction between unemployment insurance and workmen's compensation to justify departure in the case at bar from the Jensen doctrine.

We cannot repeat too often what we have already pointed out, namely, that the relief of maritime commerce from the burdens of discordant legislation, if a legitimate constitutional objective in the field of workmen's compensation, is an equally legitimate constitutional objective in the field of unemployment insurance.

Due to the ambulatory character of maritime employment, the application of state unemployment insurance laws in the maritime field must necessarily result in confusion: employers may be required to make contributions into the funds of various states with respect to the same employment and employees may be uncertain as to the existence and the extent of their rights under the unemployment insurance laws of the various states in which they may perform services.

The Court below, ignoring the presence in the instant case of this constitutional objective, seized on the distinction that although workmen's compensation laws superseded the com-

mon law and actually destroyed common law rights and remedies, unemployment insurance legislation does no such thing.

Again we say that acceptance by this Court of the distinction urged by the Court of Appeals will require the overruling of *Washington* v. *Dawson & Co.* where this Court was concerned only with the contributions aspect of the Washington workmen's compensation law. Arguments as to the supersedure of the common law and the destruction of common law rights and remedies were irrelevant to the issue which was presented in that case.

Furthermore, the distinction which forms the basis of the decision of the learned Court below has been stigmatized by this Court as "a subtlety which • • • does not merit judicial adoption".

Just v. *Chambers,* 312 U. S. 383, 391 (1941).

Modification as distinguished from supplement of maritime law is no criterion of invalidity of state legislation within the maritime field. "Either supplement or modification is permissible in accordance with the accepted criterion • • •" 312 U. S. 383, 392. The accepted criterion is harmony, the absence of which is clearly discerned in this very case.

The learned Court below makes the assertion that the unemployment insurance law does not operate upon the contract of employment. This categorical assertion is inconsistent with the fact that the unemployment insurance law as an incident to the contract of hire imposes certain obligations on employers and creates certain rights in favor of employees. Any attempt to differentiate between the unemployment insurance law which supplements the contract of hire and workmen's compensation laws which modify existing rights and obligations created by the contract of hire should, for the reasons we have already discussed, be promptly rejected by this Court as an acceptable criterion of the validity of the application of unemployment insurance legislation in the maritime field.

POINT II

Whether or not Congress has the power to do so, it has not delegated to the states the jurisdiction asserted in this case.

–1–

Had Congress amended the Judicial Code "saving to claimants the rights and remedies under the unemployment compensation law of any state", such an express delegation could not have conferred the jurisdiction which is now asserted.

Knickerbocker Ice Co. v. *Stewart,* 253 U. S. 194 (1919);
Washington v. *Dawson & Co.,* 264 U. S. 219 (1923).

There has been no express delegation here. Thus the appellee is asking this Court to give greater force to the silence of Congress than has heretofore been given to its articulate voice.

Legislative history substantiates congressional recognition of the constitutional principle that the jurisdiction here asserted is not such as may be conferred by an implied license from the Federal legislature.*

---

* The committee reports on the Longshoremen and Harbor Workers Act are a significant part of the legislative history: "If longshoremen could avail themselves of the benefits of State Compensation Laws, there would be no occasion for this legislation * * *". (Sen. Rep. No. 973, 69th Cong., 1st Sess., p. 16). "The bill as amended therefore will enable Congress to discharge its obligation to the maritime workers placed under their jurisdiction by the Constitution of the United States by providing for them a law whereby they may receive the benefits of workmen's compensation * * *." (House Rep. No. 1767, 69th Cong., 2d Sess., p. 20.)

Bills have been introduced in Congress to provide a system of unemployment insurance for the maritime industry.*

These bills recite that under present conditions the benefits of unemployment insurance protection are not available to maritime employees.

Should legislation of this character be enacted serious difficulties are anticipated in addition to those difficulties which now exist because of divergent state laws or possible divergent applications of identical state laws.

Discordant administrative determinations respecting the status of maritime employees are inevitable, depending upon the pressures in the particular proceeding. Particular services may be found to be New York employment; they may be found to be New Jersey employment. They are susceptible of classification as services by an officer or member of a crew; they are susceptible of a contrary classification.

Benefits** and contributions*** by employers will vary as between particular state laws and as between state laws and possible federal legislation. Administrative authorities naturally will wish to provide benefits to claimants where their need is great and it must be anticipated that they may do so without too much regard for jurisdictional niceties. Nor would we have a quarrel with such an attitude were it not for the fact that it may mean serious financial burdens to the employer whose liability for contributions is thus determined. The employer has a right to know in advance how much to pay and to whom. Appellant, at the present time, is embarrassed by the question involving possible

---

* See H. R. 560; H. R. 5446.

** e. g., employees now prefer classification as railroad employees to secure the higher benefits of the railroad retirement system.

*** New Jersey requires an employee's contribution, New York requires none.

liabilities to New York and New Jersey. If federal legislation in the maritime field is enacted and the decision of the Court of Appeals of New York is permitted to stand, its embarrassment will be further increased.

Conclusion

The differences between unemployment insurance and workmen's compensation are not such as to render inapplicable here the doctrine of *Southern Pacific Co.*, v. *Jensen*. A reappraisal of the principle of that case and its repudiation at this time would have "unfortunate practical results". The desirability of providing universal unemployment relief requires the application of the *Jensen* doctrine since this end can be achieved, and its achievement is actually projected, by appropriate federal action consonant with this doctrine.

The order of the Court of Appeals should be reversed

Dated, Brooklyn, N. Y., April 12, 1943.

Respectfully submitted,

ARTHUR E. GODDARD,
Counsel for Appellant,
177 Montague Street,
Brooklyn, N. Y.

JULES HABERMAN,
ROBERT B. LISLE,
Of Counsel.

APPENDIX

Statutory Provisions

I

Present Definitions of Employment

New York

§ 502. Definitions as used in this article:

1. "Employment," except where the context shows otherwise, means any employment under any contract of hire, express or implied, written or oral, including all contracts entered into by helpers and assistants of employees, whether paid by employer or employee, if employed with the knowledge actual or constructive of the employer.

(1) The term "employment" shall include an individual's entire service, performed within or both within and without this state if: (a) the service is localized in this state; or (b) the service is not localized in any state but some of the service is performed in this state, and (i) the base of operations, or, if there is no base of operations, then the place from which such service is directed or controlled, is in this state; or (ii) the base of operations or place from which such

New Jersey

Section 43:21-19. As used in this chapter, unless the context clearly requires otherwise:

* * * * *

(i) (1) "Employment" means service, including service in interstate commerce, performed for remuneration or under any contract of hire, written or oral, express or implied.

(2) The term "employment" shall include an individual's entire service, performed within or both within and without this State if:

(A) The service is localized in this State; or

(B) The service is not localized in any State but some of the service is performed in this State and (i) the base of operations, or, if there is no base of operations, then the place from which such service is directed or controlled, is in this State; or (ii) the base of operations or place from which such service is directed or con-

service is directed or controlled is not any state in which some part of the service is performed, but the individual's residence is in this state.

(2) Services performed within this state but not covered under paragraph (1) of this subdivision shall be deemed to be employment subject to this article if contributions are not required and paid with respect to such services under an unemployment compensation law of any other state or the federal government.

(3) Services not covered under paragraph (1) of this subdivision and performed entirely without this state, with respect to no part of which contributions are required and paid under an unemployment compensation law of any other state or of the federal government, shall be deemed to be employment subject to this article if the individual performing such services is a resident of this state and the commissioner approves the election of the employer for whom such services are performed that the entire service of such individual shall be deemed to be employment subject to this article.

trolled is not in any State in which some part of the service is performed, but the individual's residence is in this State.

* * * * *

* * * * *

(4) Services not covered under paragraph (2) of this subsection, and performed entirely without this State, with respect to no part of which contributions are required and paid under an unemployment compensation law or any other State or of the Federal Government, shall be deemed to be employment subject to this chapter if the individual performing such services is a resident of this State and the commission approves the election of the employing unit for whom such services are performed that the entire service of such individual shall be deemed to be employment subject to this chapter; *provided*, written objections on the part of a substantial proportion of such individuals affected are not presented to the commission within ten days following the filing of such election.

(5) Service shall be deemed to be localized within a State if

(4) Service shall be deemed to be localized within the state if

(a) the service is performed entirely within the state; or (b) the service, performed both within and without the state, but the service performed without the state is incidental to the individual's service within the state, for example, is temporary or transitory in nature or consists of isolated transactions. § 502, 1 of Chapter 31 of the Consolidated Laws of New York.

(This section was amended by L. 1941, c. 33, § 7, eff. Feb. 27, 1941; L. 1941, c. 169, § 1, eff. March 27, 1941; L. 1941, c. 669, § 1, eff. April 22, 1941; L. 1942, c. 223, § 2, eff. March 29, 1942; L. 1942, c. 402, eff. April 11, 1942. L. 1941, c. 33, consolidated into a single subd. 1, two separate amendments thereof by L. 1940, cc. 217 and 799. L. 1941, c. 169, omitted "in which all or the greater part of the work is to be performed within this state", from end of first paragraph.)

(A) the service is performed entirely within such State; or

(B) the service is performed both within and without such State, but the service performed without such State is incidental to the individual's service within the State, for example, is temporary or transitory in nature or consists of isolated transactions.

• • • • •

(7) The term "employment" shall not include:

(A) • • • • •

(B) • • • • •

(C) Service performed as an officer or member of the crew of a vessel on the navigable waters of the United States;

• • • • •

(§ 19, Chap. 21, Tit. 43 of the Revised Statutes of the State of New Jersey.)

II

Section 530 of New York Labor Law

(Section 530 of Chapter 31 of the Consolidated Laws)

Subdivision 2 as amended by the Laws of 1940, Chapter 426, effective April 12, 1940:

"§ 530. *Hearings on disputed claims for benefits.*

1. • • • • •

2. When the initial determination of a claim for benefits, upon which a hearing has been requested pursuant to the provisions of this section, involves the question whether any person is or was an employer within the meaning of and subject to this article and is or was liable for the payment of the contributions imposed upon employers by this article, or the question whether an employer, as defined by this article, has fully complied with the obligations imposed upon employers by this article, written notice of the hearing shall be given to such person or employer, either personally or by mail, and thereupon he shall be deemed a party to this proceeding, entitled to be heard. Upon such notice having been given, the referee may then decide such question or questions and any other issue related thereto, and his decision shall not be deemed limited in its effect to the immediate employee making the claim for benefits, but shall be deemed a general determination of such questions with respect to all those employed by such person or employer for all the purposes of this article, and such decision shall be conclusive and binding upon him, subject, however, to the right of appeal hereinafter provided. Added L. 1935, c. 662, § 23; amended L. 1940, c. 426, eff. April 12, 1940."

Opinion of New York Attorney General

(1936 REPORT OF ATTORNEY GENERAL)

Page 268.

LABOR LAW, ARTICLE 18, UNEMPLOYMENT INSURANCE FUND—OFFICERS AND MEMBERS OF CREWS OF VESSELS DOCUMENTED UNDER THE LAWS OF THE UNITED STATES; OPERATORS OF TUG BOATS, FERRY BOATS AND THEIR EMPLOYEES WORKING IN NAVIGABLE WATERS SOLELY WITHIN THE GEOGRAPHICAL LIMITS OF NEW YORK STATE.

The Unemployment Insurance Fund Act Does Not Apply to the Owners of Vessels Documented Under the Laws of the United States, or to Owners of Tug Boats, Ferry Boats, etc., Operating Exclusively in Navigable Waters Within the Geographical Limits of the State.

This will acknowledge receipt of and answer your memorandum of December 5, 1935, in which you ask the following:

(a) May the New York State law extend its jurisdiction to officers and members of crews of vessels documented under the laws of the United States?

(b) May the New York State law extend its jurisdiction to operators of tug boats, ferry-boats, etc., and their employees working in navigable waters solely within the geographical limits of New York State?

The admiralty or maritime jurisdiction of the United States covers navigable waters, craft capable of and designed for navigation of such waters and the execution of contracts pertaining to such waters and craft. Waters which form a continued highway for interstate or international commerce are navigable waters. *The Monticello,* 20 Wall. (U. S.) 430. They include, as concerns New York,

the Hudson, St. Lawrence and Niagara rivers, Lake Erie, and Ontario and the streams and lakes within the State that are commercially contributory to them, including the canals. These are all within the admiralty jurisdiction of the United States. This would seem to include all navigable waters within the geographical limits of New York State.

The question of State regulation as applied to maritime jurisdiction was raised in and determined by the United States Supreme Court in *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 114, and later in *State of Washington* v. *Dawson,* and *Industrial Accident Commission of California* v. *Rolph Co.,* 264 U. S. 219. In both of these cases, the court held that the Workmen's Compensation Law of the State of New York could not be given maritime jurisdiction. Mr. Justice McReynolds, delivering the opinion of the court in the *Knickerbocker Ice Co.* case, stated in part:

> "The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction. Moreover, it took from the states all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations. To preserve adequate harmony and appropriate uniform rules relating to maritime matters and bring them within control of the Federal government was the fundamental purpose; and to such definite end Congress was empowered to legislate within that sphere.
>
> "Since the beginning Federal courts have recognized and applied the rules and principles of maritime law as something distinct from laws of the several states—not derived from or dependent on their will. The foundation of the right to do this, the purpose for which it was granted, and the nature of the system so administered, were distinctly pointed out long ago:

> "'That we have a maritime law of our own, operative throughout the United States, cannot be doubted. * * * One thing, however, is unquestionable; the Constitution must have referred to a system of law co-extensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states.' *The Lottawanna*, 21 Wall. 558, 574, 575 (22 L. Ed. 654)."

The power of Congress to legislate in respect to admiralty and maritime matters was implicitly vested by the constitutional grant of such jurisdiction to the Federal judiciary. *Ex parte Garnett*, 141 U. S. 1; *P. & N. Y. S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578; *So. Pacific Co.* v. *Jensen*, 244 U. S. 205; *The Belfast*, 7 Wall. 624. Whatever stream or body of water is navigable in fact is likewise navigable in contemplation of law. *The Daniel Ball*, 10 Wall. 557; *The Monticello*, 20 Wall. 430; *Economy Light and Power Co.* v. *United States*, 256 U. S. 113.

The maritime jurisdiction is separate and distinct from the power of Congress to regulate commerce upon the navigable waters within its territorial jurisdiction. *The Lottawanna*, 21 Wall. 558.

In the case of the *Daniel Ball*, the particular legislation was justified on the ground that the boat was plying a navigable water of the United States and that it was also engaged in interstate commerce.

In *Ex parte Garnett*, the Court said in reference to the validity of a law of Congress limiting the liability of shipowners:

> "It is unnecessary to invoke the power given to Congress to regulate commerce among the several

> states in order to find authority to pass the law in question. The act was passed in amendment of the maritime law of the country and the power to do so is coextensive with that law. It is not confined to the boundaries or class of subjects which limit and characterize the power to regulate commerce; but in maritime matters it extends to all matters and places to which the maritime law extends."

In *Washington* v. *Dawson & Company,* Mr. Justice McReynolds writing the opinion, in part stated:

> "If New York can subject foreign ships coming into her ports to such obligations as those imposed by her compensation statute, other states may do likewise. The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the states and with foreign countries would be seriously hampered and impeded."

We note that the Federal Social Security Act, Section 811-b, now exempts from the definition of employment "Service performed as an officer or member of the crew of a vessel documented under the laws of the United States or of any foreign country." The Federal Social Security Act, Section 906, further provides that "No person required under a state law to make payments to an unemployment fund shall be relieved from compliance therewith on the ground that he is engaged in interstate commerce or that the state law does not distinguish between employees in interstate commerce and those engaged in intrastate commerce."

The New York State Law, however, is silent as to admiralty employment and there being no specific exemption, the State law provisions seem to be all-embracing. There being no exemption, at first blush it would appear that officers and members of crews should be included in our

State law. The decisions of the United States Supreme Court in the *Knickerbocker* and *Washington* cases seem to hold such an inclusion, however, as unconstitutional and in contravention of federal statute.

Dated: January 27, 1936.

Very truly yours,

JOHN J. BENNETT, JR.,
Attorney-General.

DEPARTMENT OF LABOR.